IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No 77-1069

JAMES E. KEIFFER, MICHAEL DAVID WARNER, AND ROBERT E. PARKS,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HOWARD B. PEARL
ROUTE 2, BOX 1150
FORT MCCOY, FLORIDA 32637
ATTORNEY FOR PETITIONERS

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 · 504/822-1611

INDEX

TABLE OF AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No.

JAMES E. KEIFFER, MICHAEL DAVID WARNER, AND ROBERT E. PARKS,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners JAMES E. KEIFFER, MICHAEL DAVID WARNER, and ROBERT E. PARKS, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on December 29, 1977, affirming per curiam the judgments and sentences rendered by the United States District Court for the Northern District of Florida against the petitioners in this criminal case.

The said judgment of the appellate court in effect upheld the trial court's pre-trial order denying

petitioners' motion to suppress evidence seized by federal officers in the conduct of a warrantless search of an aircraft. Petitioners contend that the search and seizure violated their rights under the constitution of the United States, and they now pray that this court will review the judgment of the appellate court by way of certiorari.

OPINIONS BELOW

The December 29, 1977 judgment of the United States Court of Appeals for the Fifth Circuit was entered after the case was transferred to its summary calendar. No opinion was written, and the decision is not published. A copy of the said judgment is set out in the Appendix to this petition. The trial court did not write an opinion, but did issue a written pre-trial order denying motion to suppress. A copy of that order is set out in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on December 29, 1977, affirming the trial court's judgments of conviction. This petition is timely filed within 30 days of that date, or within an extension of time for filing, for which petitioners have applied by motion. Jurisdiction is invoked under and pursuant to 28 U.S.C. §1254(1). It is contended that the Court of Appeals has decided a federal question involving search and seizure law in a way in conflict with applicable decisions of this court.

QUESTION PRESENTED

The single question presented for review is propounded by petitioners as follows:

> Whether probable cause to conduct a warrantless search of an aircraft is created by an uncorroborated tip from an informant not previously shown to be reliable, and not sufficiently verified by details observed on the scene prior to the search.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following part of the Fourth Amendment to the constitution of the United States of America:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

STATEMENT OF THE CASE

A warrantless search of a DC-3 airplane at the Williston airport in Levy County, in the Northern District of Florida on May 13, 1976 by U.S. Customs and state officers disclosed a substantial quantity of marihuana on board, and the petitioners, with others, were arrested then and there.

Subsequently, eight persons, including these petitioners, were indicted together in the Northern District of Florida, all charged with conspiracy to possess with intent to distribute marihuana, in one count, and with knowingly and intentionally possessing marihuana with intent to distribute, and aiding and abetting each other in such possession in the second count, in violation of 21 U.S.C. §§841(a)(1) and 846, and 18 U.S.C. §2.

Pre-trial discovery motions were filed by the defendants, including a motion to suppress evidence illegally seized, and a motion suggesting that the trial court conduct an *in camera* hearing of the testimony of government witnesses whose identities were withheld as confidential. Ultimately, the trial court entered a written Order Denying Motion To Suppress On Rehearing (see Appendix), setting forth its findings and conclusions in support of its determination to deny the motion to suppress.

Jury trial of the cause resulted in conviction of the petitioners, and another, on both counts of the indictment, and all were later sentenced to identical terms. The other four defendants were acquitted. The four convicted defendants lodged a joint appeal in the United States Court of Appeals for the Fifth Circuit, and that court affirmed the judgments by its per curiam order of December 29, 1977, without opinion. The three petitioners named herein have elected to file their petition in this court to seek review. The fourth appellant has not announced his decision to undersigned counsel as to what remedy, if any, he intends to seek.

The warrantless aircraft search took place because of information given to Customs Patrol Officer Schnorbus by an informant, Marshall Purcell, over a period of about two months. Purcell is an aviation mechanic, and fixed base operator at the Williston airport, performing aircraft repairs and other services for private aircraft owners in the space leased by him. In that capacity he became acquainted with Robert Beverly, a masonry contractor residing in Williston, and a commercial pilot. On or about March 25, 1976,

Purcell claimed, he was approached by Beverly at the airport and offered $5,000.00 if he would turn his head when an airplane loaded with marihuana would land there.

That offer was relayed, with an identification of its source, by Purcell to Schnorbus within hours. Purcell also relayed every subsequent conversation he had with Beverly, when they spoke of the proposed venture. According to Purcell, Beverly said that a DC-3 aircraft loaded with marihuana would land at the airport, but he did not, or could not, furnish aircraft identification numbers, names of persons involved, the place of origin of the flight, or the date and time of its arrival. On one occasion, Purcell said he believed that Beverly told him a truck would meet the plane. Due to the paucity of information about the proposed flight of the DC-3, Schnorbus and others dealing with Purcell's calls did not, and could not, corroborate the information received. Purcell had never before furnished information concerning alleged criminal conduct, so his own reliability was not established.

Ultimately, on the morning of May 13, 1976, Purcell told Schnorbus he had been advised that a DC-3 loaded with marihuana would land at the Williston airport between 1:00 p.m. and 4:00 p.m. on that day. While Schnorbus claimed that Purcell also said on that occasion that the aircraft would taxi to a remote part of the airport, and be met there by a rental truck to off-load the cargo, Purcell testified he did not furnish those details, because he did not know them.

Acting on the Purcell tip, Schnorbus assembled a force of law enforcement officers, federal and state,

which went to the Williston airport and set up a surveillance, beginning about 1:30 p.m. At about 4:00 p.m. a DC-3 airplane arrived and landed. It taxied off the runway onto a taxi-strip, and as it came to a stop, a Ryder rental truck not hitherto noticed by the officers appeared, and backed up to the aircraft cargo door, which had been opened, and stopped 4 or 5 feet away. Immediately, before any cargo had been transferred (so that the plain-view doctrine has no application in this case, see Appendix, trial court order), the surveillance force moved in, arrested 5 persons, and searched the plane, finding and seizing the marihuana cargo and other items. Those arrested at the scene were the petitioners, and two others who were acquitted.

REASONS FOR GRANTING THE WRIT

Whether probable cause to conduct a warrantless search of an aircraft is created by an uncorroborated tip from an informant not previously shown to be reliable, and not sufficiently verified by details observed on the scene prior to the search.

In *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), this court devised a two-prong test for assessing whether an informant's tip has the probative value necessary to establish probable cause. First, there must be some indication of the underlying circumstances from which the informant concluded that the facts are as he says they are, and second, there must be some statement of the underlying circumstances from which the officer concluded that the informant was credible or his information reliable.

The *Aguilar* test was modified in *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), in which this court held that the first prong of the test can be satisfied if the tip describes the accused's criminal activity in sufficient detail that a neutral magistrate (or in this case, the officer) receiving it can conclude that the informant is relying on something more substantial than casual rumor or general reputation, or if independent observations by the law enforcement officers corroborate the allegation that the accused has committed, or is in the process of committing, a crime (393 U.S. at 416-418). Moreover, conduct otherwise innocent is not imbued with an aura of suspicion by virtue of an unreliable informant's tip; the corroborating evidence must be of criminal conduct (393 U.S. at 418).

To illustrate the point, this court in *Spinelli*, supra, made reference to its earlier opinion in *Draper v. United States*, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959). There, the informant was a "special employee" of the Bureau of Narcotics and had given accurate and reliable information to federal agents for a period of six months. He reported that Draper had gone to Chicago the day before by train and that he would return to Denver by train with three ounces of heroin on one of two specified mornings. He described with minute particularity the clothes Draper would be wearing on his arrival, and he gave a physical description of the suspect. In *Spinelli*, this court concluded that such a wealth of detail created a reasonable inference that the informant had gained his information in a reliable way (393 U.S. at 417).

Petitioners submit that the decision of the United States Court of Appeals for the Fifth Circuit, affirming the trial court's judgments of conviction, of necessity has not given due weight to the holdings of this court in *Aguilar*, *Spinelli*, and *Draper*, and consequently, has decided a federal question in a way in conflict with applicable decisions of this court. The information known to the officers in this case at the time of the search falls short of the standards established by this court. The informant's tip did not provide the wealth of detail supplied by the informant in *Draper*, supra. The informant had not previously provided information, and his reliability was open to doubt. While he asserted that he had acted solely as a public-spirited citizen, that claim is clouded by his admission that he knew beforehand that rewards were paid for information leading to seizures by U.S. Customs authorities, and by acceptance afterward of an $800.00 cash award for his services. The information he supplied, moreover, could not be independently corroborated or supplemented before the aircraft actually arrived.

Lastly, and of greatest importance, the extremely brief surveillance of the DC-3 after it landed and before the search on May 13, 1976, by the officers, yielded no reasonable suggestion of *criminal* conduct, when the officers' observations are considered apart from the tip and the suspicion created by it. There is nothing in the evidence, or in logic, to support an inference that it is incriminating to land an airplane at an airport in broad daylight, or having once landed to leave the runway and enter into a taxi-way, or for a cargo-type aircraft to be met by a truck. Thus, the on-scene observations of the officers could not corroborate the es-

sence of the tip, that the aircraft was loaded with contraband, subject to seizure.

In *Whitely v. Warden*, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971), it was said:

> This Court has held that where the initial impetus for an arrest is an informer's tip, information gathered by the arresting officers can be used to sustain a finding of probable cause for an arrest that could not adequately be supported by the tip alone. * * * But the additional information acquired by the arresting officers must in some sense be corroborative of the informer's tip that the arrestees committed the felony or as in Draper itself, were in the process of committing the felony. [401 U.S. at 567]

The decision of the Fifth Circuit in this case, to the effect that the officers had probable cause to conduct a warrantless search of the aircraft on the basis of the informant's tip and their observations at the airport, conflicts with controlling decisions of this court upon the same question. To allow it to stand will have the effect of watering down the protections afforded by the *Aguilar-Spinelli* tests, and opening the door to unreasonable searches and seizures.

Therefore, petitioners contend that certiorari ought to be granted to review the decision of the Court of Appeals in this case.

CONCLUSION

The question presented in this petition involves the basic protection afforded under the Fourth Amendment, as it has been construed by this court, and the extent to which the lower courts may infringe upon, or depart from those interpretations. The question ought to be answered unfavorably to further infringements upon the right to be secure from unreasonable searches and seizures.

Therefore, it is respectfully submitted that this petition should be granted, and the decision of the Fifth Circuit should be reviewed.

Respectfully submitted,

HOWARD B. PEARL
Route 2, Box 1150
Fort McCoy, Florida 32637
Tel. (904) 252-5392

Attorney for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that ____ copies of the foregoing Petition for Writ of Certiorari were furnished to the Solicitor General of the United States, Room 5614 Department of Justice, Washington, D.C. 20530, by mail this ____ day of January, 1978.

Howard B. Pearl
Attorney for Petitioners

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-5335
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAMES E. KEIFFER, MICHAEL DAVID WARNER, ROBERT E. PARKS, and JOHN D. BENSON,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Florida

(December 29, 1977)

BEFORE COLEMAN, GODBOLD, and TJOFLAT, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

* Rule 18, 5 Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409

1 See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

THE UNITED STATES OF AMERICA

versus GCR 77-002

JAMES E. KEIFFER, et al.

ORDER DENYING MOTION TO SUPPRESS ON REHEARING

This case came on for rehearing on defendants' motion to suppress on March 23, 1977, pursuant to the court's order of March 9, 1977. After hearing the evidence and the arguments of counsel, the court determines that the motion to suppress is not well taken and should be denied. Pursuant to Rule 12(e), Federal Rules of Criminal Procedure, the following constitutes the courts findings and conclusions in support of the determination to deny the motion.

A comparison of the testimony of the arresting officers (Agent Snorbuss and Deputy Sheriff Melton) at the previous hearing held on this motion with the in camera testimony of the informant, Mr. Purcell, and Mr. Purcell's testimony on March 23, 1977, shows a discrepancy as to certain facts. The arresting officers testified that, prior to the landing and subsequent search of the aircraft in question on May 13, 1976, they, the officers, had information from Purcell that a DC-3

aircraft would land at the Williston, Florida airport on May 13, 1976 between the hours of 1:00 and 4:00 p.m., that the aircraft would taxi to a remote point at the airfield, where, unobserved, it would be met by a rental truck and a load of marihuana would be transferred to the truck. Mr. Purcell testified, both in camera and at the March 23, 1977 hearing, that he notified Agent Snorbuss of a plan to land the DC-3 aircraft carrying marihuana on May 13, 1976, between the hours of 10:00 a.m. and 4:00 p.m., but that he did not relay the details of the planned maneuvers of the aircraft subsequent to its landing, because he has not aware of such details. Mr. Purcell did testify that, on one occasion he believes he may have been told that the aircraft would be met by a truck and that he may have relayed that information to Agent Snorbuss.

The evidence indicates that Mr. Purcell is a law abiding citizen who became involved in this case because, as the fixed-base operator at Williston airport he had been contacted in the past by Agent Snorbuss who requested that Purcell relay suspicious landings at the airport to Customs authorities and, again because of his position at the airport, he was approached with an offer of $5,000 to "look the other way" while an aircraft landed to unload a cargo of marihuana. The evidence further establishes that this incident constituted the first occasion on which Mr. Purcell acted as informant regarding criminal enterprises.

The question thus arises whether the tip given to the arresting officers by Purcell was reliable or whether it was sufficiently verified by corroborative details on the scene prior to the arrest and search in question to

furnish probable cause for the search. See *Aguilar* v. *Texas*, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *Spinelli* v. *United States*, 393 U. S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); *Draper* v. *United States*, 358 U. S. 307, 79 S. Ct. 309, 3 L. Ed. 2d 327 (1959); *United States* v. *Brennan*, 538 F. 2d 711 (5 Cir. 1976). Defendants argue that, without the corroborating details as to the aircraft maneuvers on the ground and its being met by a truck, the Purcell information was not verified and reliable and that probable cause did not exist, since Purcell testified that he gave no such details to the arresting officers.[1]

The inconsistency in the testimony regarding whether those details were within the officers' knowledge prior to the search need not be resolved, since the officers had sufficient information to establish probable cause absent those details. As the Fifth Circuit has stated:

> "The rationale behind requiring a showing of credibility and reliability [of an informant] is to prevent searches based upon an unknown informant's tip that may not reflect anything more than idle rumor or irresponsible conjecture. Thus, without the establishment of the probability of reliability a 'neutral and detached magistrate' [or, in this case, the arresting officers] could not adequately assess the probative value of the tip in exercising his judgment as to the existence of probable cause. Many informants are intimately involved with the persons informed upon and with the illegal conduct at hand, and this circumstance could also affect their credibility."

United States v. *Bell*, 457 F. 2d 1231 (5 Cir. 1972).

1 The officers did not await the unloading of the aircraft to arrest and search, so the plain-view doctrine has no application in this case.

In this case the arresting officers had information from Mr. Purcell, known to them to be a responsible and law abiding citizen, that he had been approached because of his position and offered $5,000 to allow an aircraft to land with a load of marihuana at the Williston airport. It is true that this information came from one Mr. Beverly, an apparent co-conspirator in the scheme, whose reliability, veracity and access to facts was unknown. Nevertheless, an approach to a man in Mr. Purcell's position to attempt to involve him in the scheme and thus reduce the risk of detection is entirely consistent with the criminal enterprise under investigation in this case. Moreover, Mr. Beverly approached Mr. Purcell no less than four times regarding the proposed venture, and each time Mr. Purcell immediately informed the authorities of the contact. Thus, the arresting officers had good reason to believe that Beverly and his associates were in fact seriously contemplating the smuggling of marihuana into the Williston airport.

In addition to that information, Mr. Purcell relayed to the officers the fact that the plane was a DC-3, and that it would land at Williston airport between 10:00 a.m. and 4:00 p.m. on May 13, 1976. On the date and within the hours predicted by Mr. Purcell the aircraft did in fact land. Thereafter the officers observed it taxi

to a position where a truck, theretofore unobserved, began backing out of the foliage surrounding the taxiway toward the aircraft before the craft had even cut its engines. In the court's opinion, this suspicious circumstance when coupled with the specific incriminating information previously supplied to the officers by a credible citizen, presented probable cause for the search and arrests in this case, even if the officers involved were not aware of the further corroborating details regarding the planned maneuvers and rendezvous of the aircraft with the truck.

Accordingly, it is

ORDERED:

Defendants' motion to suppress is DENIED.

DONE AND ORDERED this 24th day of March, 1977.

/s/ WILLIAM STAFFORD
WILLIAM STAFFORD
UNITED STATES DISTRICT
JUDGE